The Information contract. Contractual aspects

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THE INFORMATION CONTRACT

Contractual aspects : confidentiality clauses

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INTRODUCTION

1. The present report contains an analysis of "confidentiality" clauses to contracts relating to access to electronic interactive information services.

The word "confidentiality" is used with two different meanings :

- first of all, confidentiality is a form of protection used by a party with a direct or indirect right over an information product or simply over its control to protect itself against uses by unauthorised third parties which would prejudice his investment. It therefore involves restrictions on the use of the information product. Restrictions of this kind are essential either at the last stage of distribution of the final product, when they relate to the possibilities of use by the final user, or at an earlier stage, when it is a question of controlling the distribution of the information product, by excluding the distribution of competing products, or by granting certain privileges to one of the parties involved in creating or distributing the information product in question. This report will be limited to analysing only those restrictions imposed on the final user and aimed at protecting the investment involved in developing of an information product.

- secondly, confidentiality is a form of data protection resulting from the use of the information produced by the final user (whether a company or an individual). It therefore relates to restrictions on the use of search data.

Confidentiality clauses in this second sense are intended to protect the user, sometimes protecting his purely private interests (protection of privacy), and sometimes, in the case of professional users, business secrets in the widest sense of the term.

2. Access to electronic interactive information services takes place by means a variety of techniques and presupposes the involvement of a number of operants.

Prior to analysing the clauses we intend to look at these techniques and the role played by each of these operants. Indeed, without these preliminary comments it would be difficult to understand the effect of the various clauses.

We therefore propose the following plan :

1. Preliminary remarks, access technique, and the operants;

2. Confidentiality clauses and protection of investment;

3. Confidentiality clauses and protection of users.

1. PRELIMINARY REMARKS

1.1 Access techniques

3. Access to an electronic interactive information service takes place by means of a variety of techniques. A distinction will be drawn between on-line and off-line access techniques (1).

Users may prefer the off-line technique for financial reasons. In view of the likely cost of acquisition of the interrogation software necessary for interactive dialogue with the database, users may prefer to formulate or write the questions they intend to send to the owner of the database, or even have an interest in entrusting their questions to an intermediary database expert, which furthermore will avoid their having to take out a number of subscriptions (2).

On-line access techniques have the advantage of permitting interactive dialogue with the database (3).

The user has the opportunity of clarifying his question. The reply that comes up on his screen may suggest that he gives further details or make his questions more specific.

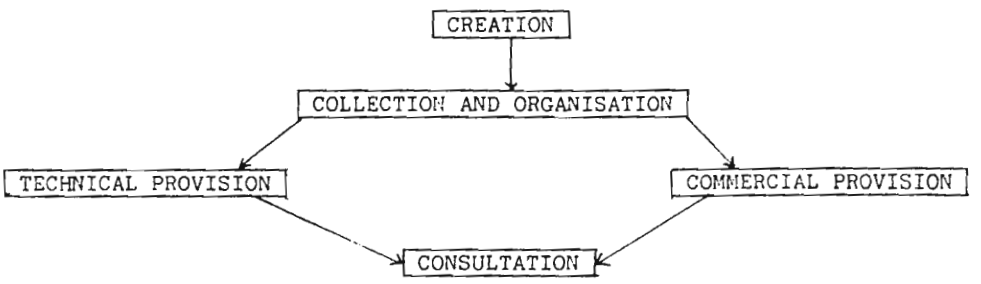
The on-line access technique calls for a link-up with the telecommunications network. It is rare for access to a database to necessitate a single privileged line, i.e. leased line. Consequently, access will be via the switching network, telephone network is analog mode or packet switching network, prior to the institution of broad band I.S.D.N. type networks.

Lastly, in some countries videotex systems have been introduced. (5) Their main advantage is that the services offered have to be standardized (e.g. interrogation software) and enable the number of accessible databases to be increased using standard law cost equipment.

1.2 The operants

4. The development and distribution of a electronic interactive information services involves a substantial number of functions. Each function may be exercised by a different operant, although often several are carried out by one single agent (6).

The following diagram (7) shows out the various functions:



In this connection, a distinction will be drawn between those functions that are necessary and those which very often are added for either technical or organisational reasons. (8)

1.2.1 Description of the functions

a. The necessary functions, basis framework

5. Any telematics operation involves at least three operants : the first supplies the services, the second uses it and the third permits interactive dialogue between the supplier and the user.

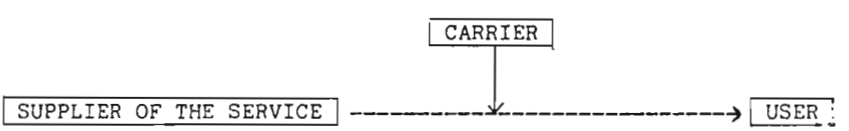
- The information service provider is "a party with the capacity to offer a final product comprising a whole set of data" (9). It should be noted that the product offered is not solely the set of data, it is also, as Bensoussan notes (10), "the information format (including the menu) marketing methods (including assistance to the user), and various groupings between one and several information systems sometimes with additional services linked to them, such as the preparation of profiles or specific research". Thus the information services provider is responsible for all the services enabling the database to be used.

- The user is the beneficiary of the service, who may be an individual or a company. He communicates, by means of a terminal, with the information service provider with aim of obtaining information or carrying out transactions.

- Finally, the carrier is a public or private body which transmits the messages by means of a telecommunications cable or Hertzian network; i.e., it is the essential link between the user and the supplier of the service. In the words of the French order of December 30, 1983 (II), it is a body managing a telecommunications network whereby users have access to the information service providers' host computer.

6. Link-up between the user and the host computer may call for the involvement of a number of different carriers, particularly when there is cross-border data flow. This may also apply when the network is owned or merely managed by a variety of different public or private persons or bodies within one single country (12).

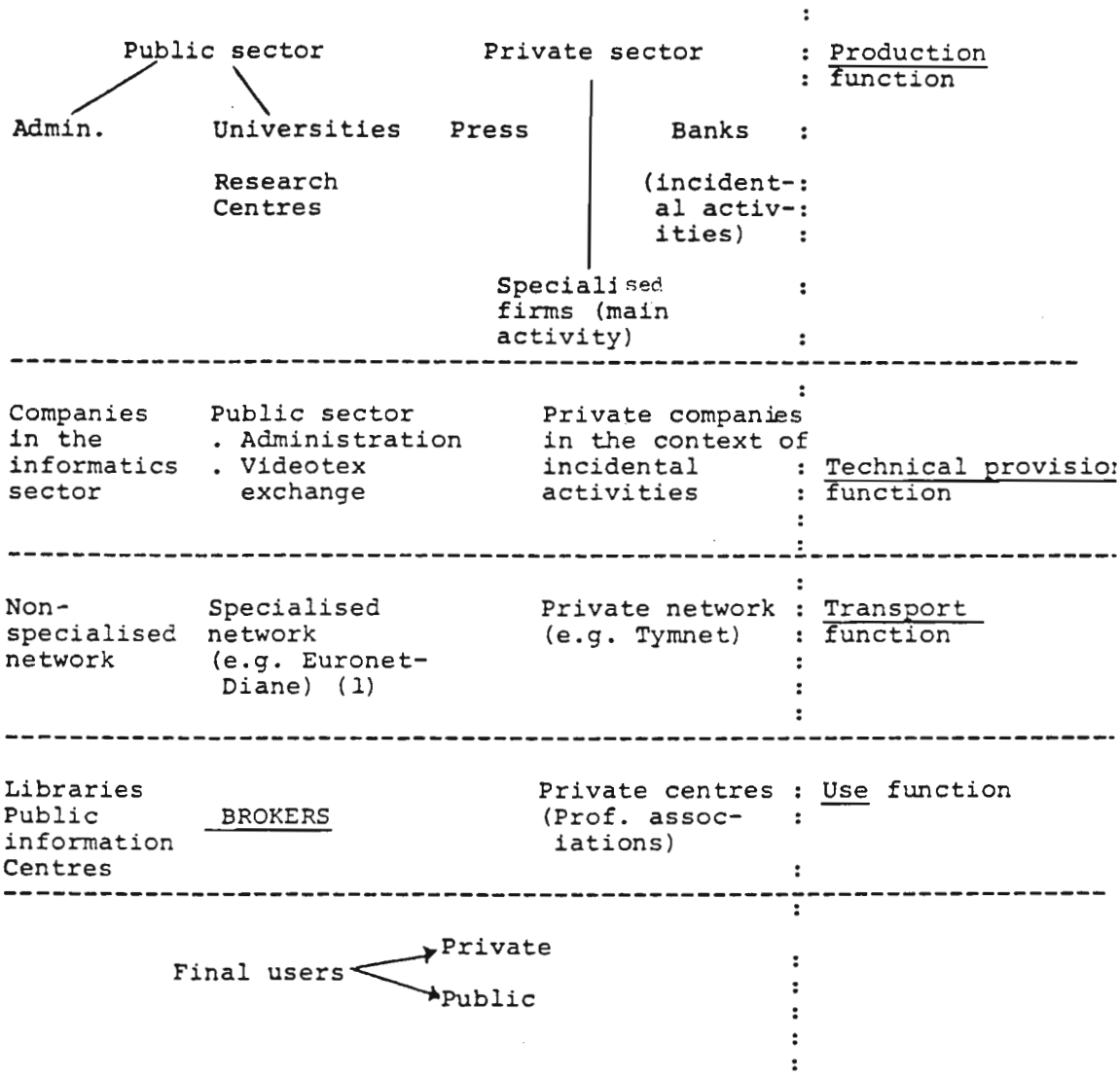
These three functions are shown in the following diagram :



b. Other functions

7. There are other functions which often necessitate the involvement of new operants.

- For example, "creation of data" is entrusted to a Database Producer, who collects the information. In the terms of one contract, the database producer is "the person authorised to validate the information". He can be thought of as the engineer of an information system (13).


Public sector
Private sector
Production function
Admin.
Universities
Research Centres
Press
Banks
(incidental activities)
Specialised firms (main activity)
Companies in the informatics sector
Public sector
. Administration
. Videotex exchange
Private companies in the context of incidental activities
Technical provision function
Non-specialised network
Specialised network (e.g. Euronet-Diane) (1)
Private network (e.g. Tymnet)
Transport function
Libraries
Public information Centres
BROKERS
Private centres (Prof. associations)
Use function
Final users
Private
Public

He creates one or more data "files" which, in some cases will be made available to users via information service providers, whilst in other cases he will transmit his data to the users himself. In the second case, database producers are known as "integrated information service providers ". For example, the EC Official Publications Office transmits the EEC Cour de Justice CELEX Base.

- Sometimes there is an additional party involved, between the database producer and the information service provider; this is the integrator (14). For example, a data system may originally be set up by the producer to supply its own company's needs. In order to make this information useable by other persons, the set has to be formatted and updated to accord with its final designation for "multi-user purpose" (15).

"The job of the integrator is to construct a data system likely to interest a number of final users on the basis of proprietary information supplied by the producer".

- This information system will be marketed via the information service provider, who is responsible for public or private distribution of the electronic information service. Very often, the supplier will offer access to a number of data systems from a variety of producers (16).

- The marketing of the product can sometimes be separate from its technical provision. In fact the host computer provides the information processing necessary for on-line interrogation or transmission of data contained in a database (17). The information processing involves not only the hardware necessary for storing both data and searches, but also software (sometimes made-to-measure) for controlling the running of the data bank and interactive dialogue (choice of access keys, menu, sequences that may be followed, etc) (18).

- Lastly the intermediary or broker, is a person between the user and the supplier of services to the user. He is a database expert who selects the data the user needs. Resort to the services of an intermediary is worthwhile for small companies that need a wide range of information, but do not wish either to invest in the hardware and software necessary for link-up to the host computer or, given the varied nature of their needs, to contract with more than one supplier.

In addition, and this applies to large companies too, some companies also prefer to entrust their data researches to specialists (19).

1.2.2 Types of operant and their relationships

8. The following diagram seeks to classify the types of bodies involved in each of the four main functions, that is, database production, technical provision, carriage and use.

9. The above diagram deliberately excludes the most important function from the user's point of view, i.e. the marketing of the information product.

In fact, it may be marketed by specific operants; for example, there are distributors whose sole activity is marketing database. The distributor accordingly, on the one hand, contracts in one direction with the information services provider and the database producer and, on the other hand, contracts in the other direction, with users or brokers.

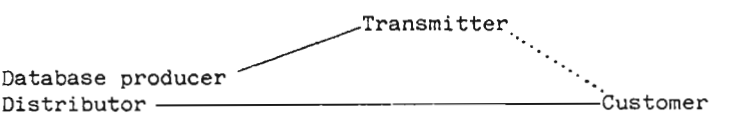
At present, marketing is still carried out by either the database producer who in theory may also be the information service provider (integrated information service), by the information service provider itself, or the intermediary (20).

10. The variety of possible contractual situations calls for a certain amount of reflection so as to determine the problems to be dealt with subsequently :

a. Distribution strategies for information products vary. For example, Lamy Informatique (21) draws the following diagram of the various contractual groupings possible :

1

2



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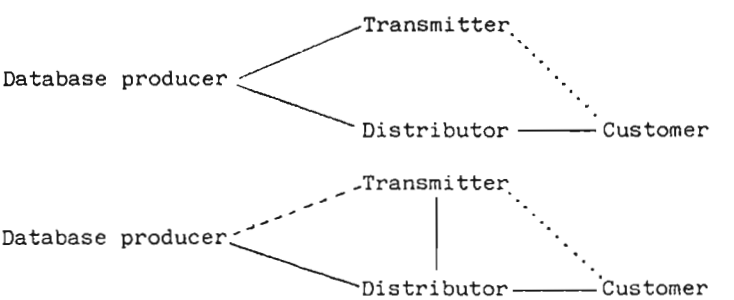
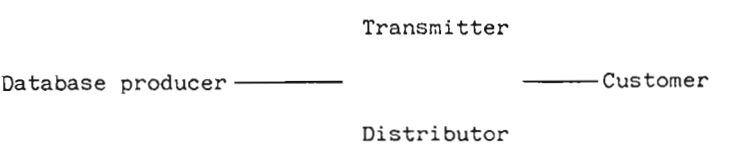


4



KEY

_____ Basic contracts

-------- Complementary contracts

..... Optional contracts

N.B. Contracts by the carrier-transmitter shown in all the various permutations have not been included in the diagram.

It will be noted that distribution strategies may vary depending on the market, on geographical criteria (e.g., direct distribution in one country, indirect distribution in another) or professional criteria, or even may apply side by side (e.g., direct and indirect distribution at one and the same time, via distributors of economic and financial data banks (financial bodies).

11. b. As we have stated, the possibility of controlling distribution methods on the basis of certain strategies must exist at all levels :

- vis-à-vis the final user, it is quite obvious that a person who decides to market an information product, even if it does not have a direct relationship with the final user, will wish to ensure that transmission cannot take place without his knowledge.

- vis-à-vis intermediaries, through which the product is distributed, he will also want the right of distribution to be coupled with a set of restrictions (22), covering the spatial limits of the right, the quality of members lower down the chain (e.g. to accept only intermediaries with a satisfactory reputation, technical equipment enabling the provision of adequate technical access (their configuration capacity) and not distributing similar databases).

12. c. According to different theories, the obligation on each operant will vary depending on the functions he is responsible for. For example guarantees relating to the data content of the bases (quality, completeness, legality) are linked to the production function; the quality of the information service (reply time, availability of the system) is a matter within the responsability of the technical provision function while user training is the responsability of the marketing function.

Consequently, the consideration of an operant's responsibility will be based on the functions which he provides : thus, an integrated information service provider will be liable both for the data content and for the quality of the teleservice offered.

13. d. Following this principle, the obligation not to divulge information resulting from searches of the telecommunications service will remain the responsibility of the person making the service available, technically the person who receives such searches at the outset.

The operant thus indicated may be either the intermediary, the information service provider or the database producer himself.

This principle does not prohibit waivers or the grouping of liabilities when the search data are communicated to other operants in the context of the fulfillment of their own functions (thus, when billing is not done by the party providing the service, but by another operant), or for other reasons (e.g., if the producer wishes to know details of users of its database and their questions for market research reasons).

We will return to these various aspects of clauses relating the confidentiality of searches later.

14. e. Lastly the analysis must take account of the "norms" or "codes of conduct" drawn up by the various professional associations set up over the past few years. For example, the European associations : EURIPA and EUSIDIC (23) which have carried out a number of studies and even drawn up some codes of practice (24).

At the national level, very often when VIDEOTEX experiments have been launched, information providers action groups, such as ANFOV in Italy (25), V.I.A. in England (26), GFFIL in france (27) have been set up which have also adopted common rules of practice (28). Some of these rules will be described below.

It is clear that the importance of these professional associations which very often group together operants involved in the various functions described above will grow.

2. CONFIDENTIALITY CLAUSES AND PROTECTION OF INVESTMENT : RESTRICTIONS IMPOSED ON USERS

15. In the introduction it was pointed out that there are two types of clauses restricting the use of the information product, the first - higher up the chain than the user - designed for regulating distribution, and the second - vis-à-vis the user - designed for limiting the possibilities of reproduction or distribution of data obtained through access to a database. The following paragraph analyses the second type of clause.

16. There are a variety of reasons for restricting the use of data :

- first of all to provide the best possible conditions for ensuring the financial profitability of the investment ;

- secondly, some restrictins are imposed for reasons of confidentiality and security relative to the content of the investment. For example, the data may appertain to individuals ; its content may involve companies' business secrets or lastly its content may be deemed to be of strategic importance for the country where the investment was carried out.

Such restrictions will lead investors to closely supervise, not only final users but also distribution channels, including the security of telecommunications networks by means of which the information is transmitted.

At the outset, it should be noted that some of the grounds mentioned above are hardly touched on by the agreements we have been able to analyse.

17. So far as restrictions imposed on final users are concerned, it seems that two questions should be raised :

- Who should lay down these restrictions ? Why and How ?

- What types of restrictions are there ?

But before turning to these questions, it seems essential to mention a new factor on the scene: Downloading. This is the reason for the producer's and information provider's fears. It underlies the restrictions contained in the agreements. The types of restrictions on use currently included in contracts are being modified to take account of this factor.

2.1 The new factor : DOWNLOADING

18. "Downloading" is a term used to denote that the user has material communicated to his local computer facility, and stores the material at this facility" (29).

The main feature of downloading is that the user does not limit his use of the database to one or more hard-copy print-outs, but can use part of it - which may be quite substantial - on his own data processing equipment (magnetic tapes or disquettes) and thus envisage autonomous use of this information in the context of his own data processing system.

Thus he may store of the database in his own computer memory and interrogate it again as often as he wishes, act as his own internal information provider in the case of multi-user service, or even be a host computer to others by linking users from outside his firm to his own data processing system. He also has other opportunities open to him, such as enriching the base with his own data end reformatting it, merging it might be merged with the information product, and thereby enhancing its value for the database producers and information providers (31).

This new factor is explained by technological progress : the standardization of search language that can be used even on small configurations: the increase of memory capacities; the growth in the number of micro-computers; facilities offered by telecommunication technologies; etc.

19. Downloading fundamentally modifies the strategies of database producers and information service suppliers which to date have been faced only with simple hard-copy reproductions and from now on will have to take into account the possibility of the downloading of part or even the whole of the database by users (32).

That is why database producers and information providers have gradually allowed the introduction of Downloading (33) while seeking to control it by Downloading Policies, which will be examined in point C. (34). In particular it will be noted that the first Code of Practice proposed by the European association E.U.S.I.D.I.C. (35) which groups together information Providers, suppliers and users, in fact deals with the subject of Downloading.

Having dealt with these various details, we propose to look at the following questions : What is the basis of these Downloading Policies, or other clauses restricting use ? How are they made binding on the user and what do they contain ?

2.2 What and How ?

20. It is clear that the first party interested in the restriction in question is the database producer. It is up to him to stop users from becoming distributors of information in their turn and taking some of the producer's potential customers of the same producers for their own advantage.

It is easy to understand that information providers are also sensitive to the same argument, since the users' action runs the risk of depriving them of certain connections and consequently of certain "commissions" due for their roles as intermediaries.

21. Next, one can imagine that when both producers and information providers calculate their profitability they take account of the degree of use and the number of users of their database when determining the subscription price. Thus, in the view of certain information providers (35), the small firm in which a single potential user has one single terminal should be charged differently from a large multi-user enterprise with a large number of terminals.

Without analysing this question in depth, the following points need to be stressed :

- on the one hand, the recognition of protection of the information product by copyright would seem to justify application of the principle of differential tariffs (in some countries) (37). In particular, countries such as France and Belgium which recognize the author's "right of destination" of his work and authorize him to regulate (38) the financial terms and limits of use of the information product even when there is no relationship with the final user (39);

- on the other hand, in the European context, article 86 of the Treaty of Rome only authorises differential tariffs of this kind insofar as they are based on objective criteria (40), under penalty of constituting abuse of a dominant position.

22. Lastly, a third ground is linked to the very confidential content of certain databases. Some data is such that its use by unsupervised persons presents a security risk, a risk to national independence or even to a political system shared by several different countries (c.g. Special Services on Nasa files restricted to E.S.A. Member States). Thus, certain databases require strict supervision of their distribution. In this connection, we find restrictions similar to those protecting certain new technology products (41).

23. The means whereby certain restrictions are imposed on users will vary depending on the marketing methods applying to the information product. In fact as we noted the user may contract with the database producer direclty, with a broker or with the information provider.

In the first case, the clauses are imposed contractually on the user by the producer or the integrator directly (42).

In the second case, how can the producer ensure that the information provider will indeed impose the restrictions it desires on the user - with whom he has no contractual relation ? Here a distinction can be drawn between clauses in contracts between database producers and information providers and those applicable to contracts between information providers and users :

- contracts between database producer and information provider. They contain clauses such as : "The subscriber must obtain an understanding from his customers whereby the latter will abstain from communicating to third parties in any way whatsoever (in consideration of payment, free of charge, or otherwise), any OECD data obtained by the intermediary of the subscriber's system(s). The subscriber for his part may sign a global agreement so as to obtain from its customers their undertaking not to communicate the data stored in machine readable form in (its) system(s)".

- contracts between information provider and user. Here the information provider often protects himself by using a dual method : on the one hand he includes a general clause in the contract, such as : "The Customer expressly accepts not to reproduce, in whole or in part, the data for communication to third parties without payment, no to commercialise them and not to use them in the carrying on of any business of creating or commercialising databases".

In addition, the information provider includes a reference to more specific restrictions proposed by each database that the host computer gives access to, and the restrictions are set out in an appendix to the contract. "The customer further undertakes to comply with the restrictions

on use (which are contained in appendix 1), particular to each of the databases to which he may have access". The same contract adds : "The clauses of the present article constitute an essential and indispensible condition of the present contract."

It must be pointed out that in some exceptional cases, where the producer is in a position of strength, he is able to control the imposition of these restrictions on users by the information provider.

24. The problem of the intervention of intermediaries is resolved in the same way. Respect of the restrictions on use imposed on the final user is subject to control by the intermediary. It will be noted that the content of the "brokers' special conditions" proposed by C.I.S.I. reads as follows : "The transfer of data resulting from selection and processing contained in databases or data banks installed at C.I.S.I. is permitted in respect of a reseller provided that he undertakes to make his customer respect the clauses in the present appendix (i.e. the restrictions on use of the databases to which he has access);...

In case of data banks requiring the written agreement of the producer, C.I.S.I. will have the present appendix referred to the said producer".

On the same subject, it is to be noted that some contracts clearly exclude for the broker the application of the general conditions offered to users (43). It will be noted that the E.U.S.I.D.I.C. Code of Practice clearly excludes them from the field of application of certain "provisions" as follows :

a. "There is one class of organisation or individual purchaser which falls outside the provision of clause 6.21 (prohibition of sale to third parties). These are professional information brokers or other individuals who purchase information on behalf of their clients on a one-to-one basis ...
This general class of professional brokers should be accorded this special status if
(a) they act in accordance with a recognised Code of Practice, such as the E.U.S.I.D.I.C. Code and
(b) they make their best efforts to ensure that their clients are aware of, and act in accordance with, the provisions of this code".

Point (b) refers to the same obligation as the one already imposed on information service providers, namely that of clearly indicating in their contractual relations with the user the restrictions on use required by the database producers. As the E.U.S.I.D.I.C. Code notes : "the purchaser of an electronically delivered information product must be aware of the limits imposed by this agreement with the vendor of the product regarding the extent to which the information may be reused, retained and further redistributed".

25. If the user is not aware of the restrictions imposed by the producer it is clear that the latter may always prosecute the user on the basis of unfair competition. Whether he may do so on the basis of his copyright - when in theory there is no contractual relationship between him and the user - is a matter of doubt. Although this kind of action seems possible in some countries, most of them (cf. UK, GFR and USA) have adopted the doctrine of exhaustion of rights after the first "sale" (44). In consequence, the operation of redistribution of the information product by information providers or brokers may no longer depend either on consent

or on the producer's conditions, unless the latter requires the providers or brokers to set out the conditions in question in their own contracts with the final user. Accordingly, we can understand why conditions restricting the use of databases often dictated by the producers form an integral part of contracts with users, even when these contracts are not concluded by the producers.

2.3 Types of restrictions

26. Before analysing the various types of restriction and the particular ways in which they are drafted, it is useful to set out the actual principles underlying the criteria used by these clauses.

2.3.1 The actual principles underlying the clauses

27. Until a few years ago, that is before Downloading became generalised, the clauses were based on two criteria : the number of copies and the fact that distribution of these copies was to be for internal use only.

The terms of the problem have been deeply altered by the fact that part of the database can now be stored, used and reused on other occasions, that it can be reformatted, improved, modified and made accessible to many users both inside and outside the company.

Downloading Policies all start from the principle highlighted by the Code of Practice proposed by E.U.S.I.D.I.C. (Point 6.5) "It is the view of this Code that the mechanism used for downloading is not a significant issue ; information products can be downloaded either to magnetic storage or to paper. What is of concern is the use to which downloaded information is put". In other words, it is not the reproduction media that is the criterion of regulation (whether the reproduction is in hard copy form or on diskette), but its final destination.

This kind of policy of non-discrimination as to media, is explained at one and the same time by the inability of database producers or information providers to supervise the means of reproduction but also by their wish not to hinder the use of more advanced technology.

28. On the question of final destination, from a reading of the E.U.S.I.D.I.C. Policies and Code of Practice, these fall into three categories (45):

- "single user or multiuser";
- "internal use or communication to third parties";
- "incorporation into a personalised database".

These various final destinations mays be combined.

The principle of the recent Downloading policies would seem to be either to restrict reproductions on the basis of one particular specific destination and, in consequence, expressly or by implication, to prohibit reproduction for other destinations, or alternatively to provide different tariffs based on the particular final destination of the reproduction.

If we compare Excerpta's approach (46), a database producer that authorises the following use : "store portions of the Excerpta Medica Databases in the form provided by E.S.F. and retrieve it, by means of a computer, for the sole purpose of refining and perfecting a search strategy and printing a copy of the final search results..." with the approach of I.N.S.P.E.C. (47) which draws a distinction between three types of licence based on three categories of use :

"(A) Temporary storage - at no extra charge;
(B) Long term storage and reuse at the downloading site - on payment of a downloading charge;
(C) Other uses e.g. multiple coying of data, use for resale etc. subject to specific written agreement and payment of appropriate charges to be negociated".

29. It is noted that this differentiation of tariffs depending on the final destination of use, as noted above (supra n° 21), may be based on the author's acknowledged "right of destination". The "right of destination" of the work, in fact, enables tariffs to be differentiated on the basis of the type of use to which this work is to be put.

In this connection, the E.U.S.I.D.I.C. recommendations provide :

(a) that the basic tariff must enable a single copy of the information obtained to be used for an unlimited period (48) with the possibility of using it in any way, including in an altered format, printed out and merged with other data (49);

(b) that the basic tariff does not cover "multi-user" use as this has to be the subject of a separate agreement (50);

(c) that any form of distribution to third parties without specific authorization is prohibited (51).

2.3.2 Content of clauses - types of restrictions :

Clauses of this kind cover six topics :

- the first relates to media to be used and reproduction of data;
- the second to the data that can be reproduced;
- the third to the final destination of such reproduction;
- the fourth to the copyright indication that the user must include in case of certain uses;
- the fifth to information to be given by the user;
- the sixth to the duration of the use of the data.

We are unable to provide examples of all the special clauses relating to restrictions on use here, as these are so numerous and varied.

a. Media to be used and reproduction

31. This relates to either the exclusion of the authorisation of certain methods of data storage. For example, some producers (52) simply prohibit storage of their information product in machine readable form thus preventing any downloading.

Certain contracts (53) that prohibit the copying of data "onto media of any kind enabling the whole or part of the original files to be

reconstituted" are indirectly aimed at media enabling storage in machine readable form.

Others, which are more common, authorise it but solely for the purpose of hard copy print-out in a limited number of copies (54).

Lastly, recently, certain database producers have clearly authorised downloading, i.e. storage on magnetic tape or diskettes.

For example Predicasts "authorizes the downloading of data from P.T.S. Database to (an) in home microcomputer(s), word processor(s) or other storage device(s)...". The authorisation may thus be coupled with the obligation of identifying the Downloading Site, in other words the host computer on which the information received will of necessity be stored (55).

b. Data liable to reproduction

32. Here we are not dealing with cases of restrictions on access to certain databases or certain data contained in them for reasons of security knowing whether the user is allowed to reproduce the whole of the database - a simple matter and one that is quite conceivable, given the present technical capacities of computers and the relatively low cost of storage in machine readable form.

The copying of the entire database represents a risk for the producer which he will wish to prevent by only permitting partial reproductions. Strangely enough, clauses prohibiting the customer from "emptying a database" are rare. They are only to be found among contracts authorising Downloading, which is logical, given the risks attached to this technique.

For example, Mead specifies : "the stored information can include only an insubstantial portion of any discret Library or file or similar grouping of Data" (56).

c. Final destination of the reproduction

33. Traditionally, contracts approached the problem of final destination of reproduction by prohibiting the user from making searches other than for his own needs and from marketing the database information. Clauses in this connection are classic and revolve around three principles (57).

In support of these clauses there are limitations on the number of copies (58) and specifications as to the persons permitted to converse with the database, who must of necessity be employees of the user firm. Lastly, some clauses defining the notion of third parties will be referred to (59).

Very few contracts stipulate that the undertakings, particularly those of a non-commercial nature, apply beyond the contractual period (60).

34. The authorisation of Downloading practices has made a more detailed analysis of the final destination of the reproduction essential. Without going into further detail about the clauses analysed above (supra n° 28), we would draw the reader's attention to the importance of reading the clauses proposed very closely.

The example of Excerpta is interesting in this connection : "E.S.P. grants the user permission to do the following : store portions of the ... Databases ... in the exact form provided by E.S.P., and retrieve it by means of a computer, for the sole purpose of refining and perfecting a search strategy and printing a copy of the final search results..." The question that the user might ask himself is whether the final destination thus defined includes the possibility of creating a personal database (61). The reply must be in the negative : in the first place, storage must be the actual form in which the data was received (62); secondly, point (c) adds : "The stored material may not be changed, repackaged, merged with other data or otherwise manipulated, with the purpose of creating a database". In the absence of such specifications, the reply might be different.

Likewise, in the case of the Mead "Temporary Information Storage Policy", the possibility of creating a personal database has to be excluded : "this storage policy may be used for local printing and word processing purpose only".

d. Indication of copyright

35. "If the customer uses data from the bank in a document, he must acknowledge the source, in compliance with the right of citation" (63).

Although this statement is perhaps too absolute, since it presupposes protection by copyright, not only of the whole of the database, but also of any part of it (64), database producers often take care to provide for source acknowledgement in the following words : "The users must indicate "..." in any document or writing reproducing the said data of (producer's name)" (65).

This wording obviously applies to any documents (in the widest sense) which might be published by the user, mentioning some of the data obtained by access to the base. The generality of the wording permits the inclusion of copies on diskette or magnetic tape, including during their storage in the user's computer.

36. The practice of Downloading and the risks relating to it no doubt justify such an extension. The E.U.S.I.D.I.C Code provides expressly : "The purchaser undertakes to retain with each unit of information purchased the owner requires or as it is delivered with the unit of information when it is downloaded" (66).

The National Library of Medecine (67) imposes this obligation indirectly, even when a personal database is being created :
"if one downloads citations from N.L.M. databases and merges these with other citations, specific attribution to N.L.M. as the source should accompany each citation".

e. Information to be provided by the user

37. Information may be demanded from the user by the person marketing the information product, be this the information provider, the database producer or the broker (cf supra n° 9).

This may relate to the hardware and software used, or the number of on-line or linkable, internal or external terminals, so as to curb the risk of dissemination of information when it is downloaded.

It is clear that this information will not prevent improper use of downloading (cf supra n° 39 our reflections on controls and sanctions).

In the case of sensitive data (data relating to individuals or security questions), certain information may be required as to the security techniques installed by the user company (e.g. : certificate issued by an inspection company), and compliance with the regulation of the country in question, for example relating to privacy (68).

It will be noted that the only information asked for in the context of the contracts studied (69) relates to the identity of third parties to whom certain information extracted from the base is to be given.

f. Duration of storage of the information

38. Although it is clear that this question has raised very few difficulties until recently, given the imprecise nature of the length of conservation of hard copy print-outs, the practice of downloading has somewhat modified the situation, in view of the additional risks of competition that it brings.

It will be noted that one of the recommendations in the E.U.S.I.D.I.C Code permits a single copy to be stored in machine readable form for an unlimited period, thus the unlimited right to reuse this copy (70). In fact, firstly, the value of data lies in its newness, and consequently information stored quickly loses its value if it is not updated; secondly, the fact that the user undertakes to keep only one copy, for internal purposes, does not create any major risk of competition with the producer (71).

This recommendation has not always been followed in Downloading Policies, depending on the final permitted destinations of the downloading in question. Thus Excerpta and I.N.S.P.E.C. provide for a limited period of storage in machine readable form when the licence solely covers the possibility of storage for later processing. "The stored material shall not be retained beyond a reasonable time necessary to complete the processing of the search, normally one to three weeks".

A more expensive licence providing for : "Long term storage and reuse at the downloading site" enables I.N.S.P.E.C.'s customers to retain the copy in machine readable form with no limitation as to time.

2.3.3 Sanctions for failure to respect these clauses

39. M.G. Choisy (72) notes : "The breach of clauses restricting the use of data banks, which are essential in contracts, is the subject of immediate sanctions, provided for contractually: suspension of access to the network automatic termination of the contract. Sometimes there is simply a warning of possible legal proceedings".

Since we do not wish to comment at length on clauses in this connection, we shall restrict ourselves to two comments.

- American contracts often refer to copyright in order to justify clauses restricting use (73). In Europe, this reference is less common (74).

In this connection, it is noted that doctrine (75) uncertainty as to the possibility of obtaining adequate protection of databases against

copies retrieved from local memories (76) in the context of present copyright legislation.

40. - The difficulty of supervising the respect of the clauses analysed above is obvious to everyone, and has been the subject of discussions by experts (77). Without wishing to enter into the debate on the technical possibilities of effective supervision, which would facilitate the task of an expert appointed and accepted under the contract, it is noted that certain clauses in user contracts substantially widen the evidence available to the database producer.

For example, the S.Y.D.O.N.I. contract provides : "If any use contrary to the above provisions is brought to the knowledge of S.Y.D.O.N.I., S.Y.D.O.N.I. may ... automatically terminate the present contract after it has served notice on the customer...".

3. CLAUSES RELATING TO THE CONFIDENTIALITY OF SEARCHES BY THE FINAL USER

41. In January 1979, the American Libraries Association (A.L.A.) adopted an "Ethic of service statement" stipulating : "Information contracts with users whether reference or directional, are to be treated with complete confidentiality". During its annual conference, the A.L.A. adopted a Code of Ethics along the same lines, but even more specific : "Librarians must protect each user's right to privacy with respect to information sought or received and materials consulted, borrowed or acquired".

A.L.A.'s action continued with a survey of 75 library directors in Illinois carried out in 1982. The comments put forward by Isbel and Cook (79) set out, on one hand, the lack of cohesion and the diversity of policies relating to confidentiality and, on the other hand, the lack of sensitivity to this subject on the part of the persons in charge and at the same time the inadequacy of contractual protection or self-regulation.

3.1 User's risks and suppliers' justification

3.1.1 The risks ; Who is afraid of whom ?

42. Interaction with a professional database represents a risk for the firm, or even for the physical person within the firm carrying out the search. The risk is for a variety of reasons and emanates from different categories of persons who might learn the content of the dialogue.

43. For the company, knowledge of the search and its content enables a third party to guess the company's development prospects of its lines of research (e.g. : the consultation of patent databases), or even its present and future commercial actions (e.g. : inquiry into a company's solvency).

It must be emphasized that when the supplier also offers an expert system (such as long-range calculation of accounting ratios), the search of such expert systems, insofar as it is applied to the firm's own data, presents an even greater risk.

44. Obviously, the particular third party that the firm is on its guard against is one of its competitors. A further danger is any decision maker, be it financial, governmental or other who may modify its attitude towards the company as a result of knowledge it has gained through searches carried out by that company.

The competitor or decision maker in question may be one of the persons involved in setting up or distributing the information product : for example, a bank which offers a financial expert system or simply an economic and stock market database as an information service provider or as an intermediary, or again, a multinational producer who offers access to a database relating to activities in its sector (e.g. the chemical industry) through a subsidiary, or even through a separate information service center.

Most frequently the competitor or decision maker will be a third party who might seek to acquire the information either by means of agreements concluded with one of the parties involved in the telematic operation, or who is unauthorised (e.g., misappropriation by employees, hacking into network or the host computer, etc).

45. For the individual within the company using the information product, the risk is different : it is basically linked to the risk of surveillance within the company of each member of the staff's activities (80). The problem is linked to the more general question of Electronic Surveillance (81) and to the more specific one, already noted by C.N.I.L. of automatic recordings by company management based on the use of automatic switching devices installed in private telephone exchanges (82).

In this connection, it is clear that the use of data identifying an individul falls under data privacy protection legislation. We will return to this question later.

3.1.2 Justifications

46. In reply to such fears expressed by firm and emloyees using information products, information service providers and producers justify the storage and processing of search data : "for the satisfactory management and improvement of B.B.D. (the information product *), the producer may consider it useful, or even necessary to carry out statistical studies relating especially to the types of question and which specific data units of the B.B.D. are most or least consulted."

Apart from these reasons based on the need for a quality product to meet customer requirements, there are other reasons connected with billings. Obviously, the party billing the customer must be able to justify the amount claimed. In the event of dispute it needs to be able to produce evidence of the searches and their content.

47. It is noted that the two kinds of justification put forward above, one relating to the product and the other to billing, will not necessarilly be advanced by the same persons.

In fact the first is the concern above all of the producer, the second may also concern him if he is responsible both for marketing the information product and for billing its use.

The remarks above (supra n° 9) are however evidence that billing is very often done by information service providers or intermediaries.

Certainly, in such a case, the producer only knows the searches made by the users he has no direct relation with by indirect means.

"Unless there is a specific agreement with the other operants of the B.B.D. (*), the producer runs the risk of having hardly any information, except indirectly, on the conditions under which the service is carried out ... In addition, the producer is not aware who the users of its database are or the kinds of searches and their frequency according to the various data units making up the B.B.D., which presents serious disadvantages for management".

It is therefore important to draw a distinction between clauses contained in direct relations with the final user, i.e., those that are generally

used by information service providers or intermediaries, and those included in contracts further up the chain.

Before analysing these clauses, we propose to consider the value of two general solutions, often recommended in connection with problems of confidentiality : professional secrecy and protection of data relating to individuals.

3.2 Critical study of the two so-called general solutions

48. Are legislation or case law precedents laying down rules on professional secrecy (sometimes known as "privileged communications") on the one hand, and legislation and international conventions guaranteeing protection of private data, on the other hand, adequate solutions to the problems ?

In the context of a commentary on the contractual clauses, we are only able to develop certain general considerations on this subject.

3.2.1 The solution of protecting private data by legislation (83)

49. A preliminary comment is needed here. Apart from a few countries (Norway, Luxembourg, Denmark, Austria,...) which have extended their data protection legislation to cover data relating to legal persons, that is to say to corporate entities, most enactments, and certainly the international conventions, sanction the protection of individuals only.

Such enactments and conventions accordingly only meet the needs of individuals using database within a company.

As has already been underlined elsewhere (85), the expansion of professional telematics services is justification for extending both certain principles granted by the Privacy legislations to the individuals (as rights of access and of rectification) and certain of the limits on the right to information sanctioned by the same legislation (for example, the principle of relevance and the control of communication of information to third parties) to companies in the context of their use of the said services (87).

50. A further comment questions the starting point of the current legislation. Historically, such enactments have dealt with the risk involved in processing data received a priori from processing centres (88), whereas in fact the risks criticized here involve data created a posteriori through the use of the service itself. Existing regulations relating to public telematics services (89) demonstrate the necessity of defining a priori permitted legal uses of the data thus created to cope with the dangers created by this new type of data. The effort of certain professional groups of Information Providers to regulate the use of search data within the framework of conventions, is therefore quite legitimate.

51. Following from these two observations, there are many questions to be raised in the context of the application of data protection legislation, or at least of certain principles. For example, in what capacity is the information provider acting ? Does it record the data on its own behalf or on behalf of third parties (the database producer) ? Is the solution different in the case where the information provider is a purely technical agent (as in the case of a videotex centre), but the information product is both marketed and billed by the producer?

In our view it is important for the user to be able to know precisely in the context both of the contract and of the use of the service (first page callable on-screen at any time, for example) who is primarily responsible for applying the so-called Privacy legislation (90). In other words : who is responsible for the security obligations contained in the legislation, and who does one apply to regarding the right of access and rectification ?

3.2.2 Professional secrecy

52. Some people claim that professional secrecy - in the sense of non-disclosure of privileged cmmunications - is the solution to all the problems connected with confidentiality of searches : "The database producer - like the information service provider - is bound by professional secrecy and more generally, by the duty of discretion" (93).

Without wishing to discuss this question in detail (94), it seems to us that the statement should be defined more precisely at least so far as the laws of continental Europe are concerned (95).

Professional secrecy is an obligation sanctioned by the criminal law. The offence is committed when a person exercising certain professions called to receive secret information reveals such information intentionally. For example, article 378 of the French Penal Code sanctions "any persons to whom secrets are entrusted because of their situation or profession, whether in temporary or permanent office" (96).

Although it is clear that professional secrecy does not apply simply to a restricted list of professions, its application to information service providers and database producers is not very obvious. Apart from the fact that the word secrecy is taken to mean "secrets relating to physical persons" (97), the notion only covers facts presumed to be confidential.

Lastly, secrecy only affects persons vested with an office or a duty of confidentiality, who are deemed the law, tradition or custom to be "trustee" of the secrets entrusted to them (98). The task of a database producer and information provider is not that of collecting confidential information...

53. Accordingly, at the very most, all that can be required of them is a duty of non-disclosure following from who might be called deliberate confidences on the part of users.

"It thus appears" concludes Lambers (90) "that there is a distinction between persons who necessarily receive confidential information who are subject to the criminal law of professional secrecy and "voluntary confidents" who are merely subject to the simple duty of non-disclosure which can only make them civilly liable and, liable to disciplinary proceedings, where applicable, in the event of divulging the information".

Consequently, actions based on the violation of the duty of non-disclosure would be more likely to succeed if ethical standards on the obligation of confidentiality were promulgated within professional associations. In the case of violation, which would remain to be proved, such standards would make it possible to presume professional fault on the part of the producer or provider of the service.

Clauses relating to the confidentiality of searches are reinforced by clauses relating to confidentiality of the user code. The user code is communicated to the customer alone and very often will be modifiable simply at its request (100). In the context of this report we shall only examine clauses relating to confidentiality of searches stricto sensu.

3.3 Specific clauses

An analysis of such clauses leads us to ask the following questions :

- Who is bound by the contract ?
- What does he undertake to do ?
- Is the producer a third party ?

3.3.1 Who is bound ?

We have noted that use contracts may be entered into by the producer, the information service provider or an intermediary. It will be noted that whatever the capacity of the contractor, it enters into contract on its own behalf.

Thus, we find confidentiality clauses :

- on the part of information service providers such as C.I.S.I., Télésystèmes, E.C.H.O., C.I.T.E.R.E., Belindis, R.S.A.G., I.N.K.A. and S.P.I.D.E.L.

It is noted that a number of information service providers or producers, in particular English ones (at our knowledge C.I.S., G.E.N.I.O.S., Dun and Bradstreet) do not enter into any such undertakings;

- on the part of intermediaries such as Bibliothèque Royale de Belgique;

- on the part of database producers information providers such as E.S.A., I.R.S.;

- on the part of database producers, such S.Y.D.O.N.I., C.E.D.I.J., E.R.G.O.D.A.T.A., etc.

This said, it is clear that searches are recorded at the outset at information service centres, and that it is therefore useful in cases where the user contract is concluded with another party, for the obligation of confidentiality to be extended to the information service centres. Certainly, in this case it is justifiable to take the view that the producer is liable towards the user for the acts of its agent, whether or not the latter is the subject of a special clause in its relationahip with the producer (101).

3.3.2 What does he undertake to do ?

54. The Euronet standard contract (art. 11) draws a distinction between two different objects of the confidentiality clause : "The customer's name and address shall be stored on the searchname computer. Information entered by the customer in carrying out searches shall also be stored on the searchname computer for as long as may be necessary to service the customer's search requirements or for such longer period as may be requested by the customer. Host hereby gives an undertaking that all

such information will be kept confidential and not released to third parties without the prior consent of the customer".

In effect the clause contains

- a negative undertaking not to communicate to third parties. This undertaking can be considered to be a minimum commitment. Most contracts contain this;

- a positive undertaking to restrict its own processing relative to the customer's searches. This type of undertaking, which is more valuable for users, is much less common.

a. Undertaking not to communicate to third parties

55. Subject to the question of whether the database producer may be said to be a third party (infra n° 60), it is noted that undertakings not to communicate to third parties are drafted in more or less absolute terms.

Thus, we will compare the following standard clauses :

"X undertakes not to develop any information enabling third parties to have knowledge of the detail of searches made by a customer either directly or indirectly"

and

"X undertakes to ensure the confidentiality of the content of searches made by the contracting party".

The first type of clause is more absolute. It prohibits the communication to third parties not only of the content of searches, but also of data - i.e. the result - whereby the third party would be able to guess the type of searches made by the user without knowing the precise content as such. Thus the first type of clause would prohibit the divulging of areas of interest to a particular user, whilst the second would authorise it.

57. Sometimes this prohibition is coupled with reservations :

- authorisation by the customer : it will often have to be explicit (written agreement) (e.g. E.S.A., I.R.S.).

- The making available to all the other users of searches appearing in the view of the producer's staff to be of general interest (E.R.G.O.D.A.T.A.) whilst retaining anonymity. It is noted that this precaution, sometimes users are afraid that the mere reading of the search might enable other users to guess who seat the search.

b. Limitations on the processing of searches

58. The simple negative formula leaves "the supposition a contrario that the information service provider has full latitude to know this information" (102) and to process it internally for any purpose whatsoever: marketing, billing, improvement of the data base, or even better customer knowledge, which is useful in the context of other services (103). This customer knowledge will be even better if the

information provider distributes other databases that are also used by the customer.

The few clauses limiting processing take a variety of forms :

- the first relates to the final destination of the permitted processing. In this connection, there is a reference either to customer requirements or to the information provider's requirements. The clause proposed by Data Star refers to customer needs : "The customer's name and address shall be stored on the data Star Computer for as long as may be necessary to serve the customer's search requirements or for such longer period as may be requested by the customer" (104).

On the other hand, the formula used by ERGO DATA reads : "E will only use the said knowledge in the context of prefecting the system and improving the nature and content of the databases for which it is responsible" (105).

It would be useful for contracts to specify the processing the supplier of the service is authorised to carry out and for the pertinence of the authorised final destination of the processing to be examined by the national and international associations of information providers who might as a result propose a code of conduct in this field.

The reference made to the principle of the pertinence of processing relating to searches by users, a principle already highlighted by private data protection legislation, suggests that other principles drawn from this legislation might also be found to apply.

59. For example, the clauses might specify :

- the conditions for right to access that each user would have vis-à-vis the information service provider;

- the security techniques used by the supplier of the service for protecting the confidentiality of searches;

- the duration that the search and other data would be kept (particularly at the end of the contract) (106).

3.3.3 Is the database producer a third party ?

60. When the undertaking of confidentiality is entered into by a person other than the producer, it is important for the user, especially when the producer is a competitor (supra n° 44) to know if the producer is allowed access to the search data (107).

The reply is uncertain in the absence of precise clauses on this subject. With regard to the clauses on this point, a distinction can be drawn between clauses contained in user contracts and those in producer - information service provider contracts.

a. Clauses contained in user contracts

61. These fall into a variety of categories :

- either they consist of simply identifying the producer to a third party : "X undertakes not to divulge any information enabling third parties, including the Producers of the databases, ..." (108);

- or, to the contrary, the producer is classed with supplier of the service : "X and the producers of the data undertake ..." (109);

- or finally, communication to a certain producer and the final destination of the daid communciation are specified : "Beim einer Benutzung der X Datenbanken wird Name und Anschrift des Dialogteilnehmers an X für firmeinterne Zwecke, insbesondere zur aller Benutzungen weitergegeben" (110).

b. Clauses contained in producer - information provider contracts

62. Some contracts between producers and information providers specify the type of data to be provided to the producer.

Thus the following clauses stipulate in great detail :

"C.T.I. will deliver to the supplier the assessment of the content of the file drawn up by the users, together with consumption statistics and other reports";

"Each month, C.T.I. will send to the supplier a bill relating to the user of the services in question during the previous month";

"At the end of the contract between C.T.I. and the other contracting party (the producer), C.T.I. will deliver the customer files to the contracting parties" (111).

In another confidential contract (112), the following clauses are found : "X will provide for the computer processing of billing to users stamped by Y (the integrator). It will supply to Y the statistical data necessary for adapt the structure and content of the database to the market : counting the means of access to files, sample questions etc. X shall also supply Y with a list summarizing the bills".

63. Can the user, who is not referred to in the above clauses, take advantage of them if they are not respected?

The principle of privity or relativity of contracts leads us to reply in the negative, unless a stipulation with respect to the third party can be found in these clauses - which seems difficult. In fact, the party whose interest is protected by these clauses is basically the information service provider who intends to make it difficult for him to be "abandoned" by the producer.

This said, it is clear that without needing to refer to the clause contained in the producer - supplier contract, the user might simply refer to the fact that in his eyes the producer is a third party and that consequently either an express clause prohibits communication to third parties (cf supra n° 54), or in any case, as the contract is both confidential and intuitu personae in nature, the performance of this contract may not be divulged to third parties. These questions lead on to the last question which was left to one side : in the absence of an implicit clause, does the provider have a right to obtain communication of certain search data ?

"Although it thus appears that the communication to the database producer of information necessary to the operation of the bank is essential, the fact remains that if he does not take any precaution in this field,

the producer may come up against refusal on the part of the information service provider. Accordingly, all the conditions of communication must be clearly specified, even if the principle may not be challenged".

3.3.4 One solution : self-regulation

64. It is clear that in this connection, like the case of downloading, a general solution such as a Code of Practice subscribed to by each member of the association which each user would be fully informed of is desirable.

The A.L.A. recommendations set out at the beginning of this section might serve as a basis for such a code.

However they would need to be modified and clarified to a certain extent.

Thus reference simply to the protection of privacy is perhaps too narrow, it is a question of protecting both the "private life" of individuals and company business secrets.

Lastly precise details on the following items would be necessary :

- the length of time of storage of search data;

- the persons authorised to have access to them within the firm supplying the service, but also outside it mong the persons involved in the operation (database producer, integrator, information service provider);

- restrictions on the use of the identification number used for access to each database, in particular when it is transmitted by the information service provider;

- and the non-disclosure of search data to third parties (other users information agencies or public authorities).

FOOTNOTES

(1) Note that some databanks offer both types of access jointly.
e.g. SPIDEL's clause : "Service offered
Conventional access to databases or databanks available on S.P.I.'s computers via telephone networks or specialised data transmission networks.
Off-line edition of information contained in databases".

(2) On the role of the intermediary, our reflections infra n° 7.

(3) Many contracts refer to "access in conversational mode".

(4) Thus, G.CAM's clause provides :
"The object of the present contract is to define the conditions of conversational access via telephone or telex networks or specialised data transmission networks,...".

(5) Thus the clause in the TELESYSTEMES contract new provides the user with a choice : "The signature of the "Questel service contract" authorises you to choice one of the two following manuals : The Questel Manual, or the Questel Utilisation Guide with a MINITEL terminal...".

(6) The present section is based on the following works and articles : Lamy, Droit de l'Informatique, Paris 1986, J.W. Gochel, D. Höfer-Frey, J.Scheller, Rechtstatsachen beim Betrieb von Informations systemen, J. Schweitzer Verlag, München, 1986,
A. Bensoussan, Droit de l'Informatique et de la télématique, Berger-Levrault, Paris, 1985, M.G. Choisy, Banques de données - Aspects contractuels, A.D.I., Paris, 1983, G.F.F.I.L., Les relations contractuelles des producteurs et bases de données, Dalloz-Paris, 1986, United Nations Centre on Transnational Corporations, T.D.F., Access to the International On Line Data Base Market, UN, New York, 1983, S.T./C.T.C./41, S. Schaff - Y. Poullet, Aspects juridiques de la télématique professionnelle, Rapport national FAST, C. OPPENHEIM, Loading Databases: A Hosts's experiences, 9th Online, Déc. 85, 70 et seq.

(7) S. SCHAFF, Le contrat utilisateur, droit de l'Informatique, 1985, n° 7, pp. 2 -14. For an application to legal databases, Y. Poullet, S. Schaff, Les sytèmes informatisés de documentation juridique, in Rapports belges au XIIe Congrès de l'Académie internatonale de droit comparé, Sydney, 18-27 Août 1986, Kluwer, Bruylant, Brussels, 1986.

(8) Cf on this distinction, Y. Poullet - X. Thunis, La télématique, Aspects techniques, juridiques et sociopolitiques, Ed. Story-Scientia, 1984, p. 128 et seq.

(9) A. Bensoussan, op. cit.

(10) A. Bensoussan, Les contrats télématiques, La télématique, T.2, p. 23 et seq.

(11) A. Bensoussan, op. cit.

(12) Thus, in France, a user with a MINITEL terminal will pass on the switched telephone network before reaching the database selected via the data transmission network (TRANSPAC).

(13) According to the definition of another producer-information service provider contract, it is : The person who "ensures the definition of the product, in other words the form and content of the database". Often systems will require to be consulted on the product definition in question, in the context of a "coordination committee".

(14) Sometimes the integrator may propose a new database on the basis of more specialised databases and remaining separate. Thus "BDA is a data bank separate from specialised data banks, aimed at a similar clientele essentially made up of professionals in finance, data banks which do not fall within BDA's field".

(15) A. Bensoussan, Les contrats télématiques, La télématique, op. cit., T.2, p. 23 et seq.

(16) Lamy, Droit de l'Informatique, n° 1894, p. 926 : "the marketing function is more traditional in its manifestations : promotional activity (advertising, contracts with customers,...) conclusion of contracts with customers, training of them once become users, after sales service, billing and recovery.

(17) Cf the following clause taken from an integrator - information provider contract :

"X shall provide computer processing relative to the operation of the database :
In interactive form
Offer implies not only the management of the system as such, but also making available the interrogation language and information generation systems chosen by the integrator, together with the maintenance of the appropriate teleinformatics means to ensure that the Data Processing Centre is accessible to the whole of the French of international public network insofar as the budget income justifies".

(18) This software may be created by the information provider alone or in collaboration with the producer or the person responsible for marketing.

The choice of means, access keys and search software has important consequences as to the quality of access to a data bank. Thus for example, an information provider may permit access to a "Company" data bank by "broken" words or phonetics, whilst others will call for an exact drafting of the name of the firm. The criterion for access may extend to the location or the legal form and the sector of activities enabling the firm to be identified may be more or less minutely defined.

(19) In addition there are other motivations, such as confidentiality. Search through an intermediary does not reveal the name of the person making the search.

(20) Compare our reflections with those made by G.F.F.I.I. (op. cit., p. 38 et seq.)

(21) Lamy, op. cit. n° 1994.

(22) There can be no question in the context of this exposé of analysing the legality of the various clauses providing for control of these distribution methods, in particular with regard to competition law or the principle of the freedom of distribution of products or services.

(23) E.U.R.I.P.A., European Information Industry Association, P.O. Box 19, Wilmslow, Chesshire, SK 9 2 DI, United Kingdom.
E.U.S.I.D.I.C., European Association of Information Services, P.O. Box 429, London W4 1UJ, United KIngdom.

(24) Cf the Codes of Practice relative to Electronic Mail (November 1986) and Downloading (August 1986), codes sponsored by European Commission General Direction XIII.

(25) A.N.F.O.V., Associazione Nazionale fornitori di Videoinformazione, Via A. Saffi, 18, Turin. ANFOV is the author of a Code of Conduct for the supply of on-line Videotex services.

(26) The Videotex Information Providers' Code of Practice (1983) was issued by the Videotex Industry Association Ltd (1, Chapel Court, London SE1 1H4).

(27) The Groupement français des Producteurs d'Informations en Ligne (Rue de Lille, 103, 75007 - PARIS) is behind various works synthesizing the point of view of its members.

(28) On the interest of these codes of practice in matters relative to the new information technologies, C. Monville - Y. Poullet, La demande finale en télématique, Rapport final FAST, EEC (D.G. XII), January 1987, to br published in La Documentation Française.

(29) J. Bing, Data Base Publishing, EEC Conf. Report, Dec. 1986; Compare the definition proposed by M. Hackemann, Problems der On-line - Nutzung der Downloading Vertrag, Deutscher Dokumentartag, 1984, 526. Cf the more technical definition given by the C.A.S. Downloading Fact Sheet (Chemical Abstract) :
"Downloading means capturing information in computer readable form from C.A.S. files, whether the information is made available by C.A.S. directly or by a vendor under a C.A.S. license".
"Downloading also means relating by keing or other means, a computer-readable form of C.A.S. Information from a corresponding printed form or microform."

(30) On all these possibilities, Hackemann, art. cited, 525.

(31) ... thus raising the complicated question of copyright over these additions. On this difficult question, the reflections of O.T.A. in its report : "Intellectual Property Rights in an Age of Electronics and Information" (1986).

(32) Unless databases are provided with programming languages that prevent the data communicated from being reclassified. The direct and indirect cost of such measures seems disproportionate to the risk incurred. Sometimes Downloading is even encouraged : "The E.S.A.-I.R.S. Format has been especially prepared to facilitate the

Download of Database material from the E.S.A.-I.R.S. mainframe on the micro-computers, word processors or any form of user private magnetic support".

(33) "Damit steht der Datenbankbetreiber alternativ los vor der TATSACHE, dass er Downloading nicht verhindern kann. Es pragt sich deshalb, ob er das Downloading positiv als Dients anzubieten und so beim Nutzer dass Bewusstsein eines neuen Dienstes zu verschaffen". Hackemann, op. cit., 528. Cf also in this connection the declaration of Excerpta Medica : "More and more users are interested in Downloading in order to refuse their search objectives. Excerpta believes it would be useful for users to understand and agree to the present conditions under which Excerpta is willing to permit Downloading from its Database" and that of Inspec : "We sympathise with the device of users of the Inspec Databases to make the most effective use of the capabilities of the new systems and equipment... ".

(34) In this connection, the impressive collection of "Downloading Policies " put forward by J.A. Benson and B.H. Weinberg, Proceedings of the Congress for Librarians Feb. 18, 1985, Ann Anbor Michigan, Pierian Presse, 1985.

(35) E.U.S.I.D.I.C. Code of Practice and Guidelines, Downloading - August 1986.

(36) This is the principle defended by E.U.S.I.D.I.C. and implemented by certain information service providers (Cf infra n° 29).

(37) Compare our reflections regarding differentiated pricing of licences for computer program products, in "La protection des programmes d'ordinateurs en droit belge et hollandais", Droit des affaires, 1987, p. 586, n° 26.

(38) In this connection, in Belgian law, F. Gotzen, Het Bestemmingsrecht van de Auteur, larcier, Brussels, 1975; in French law, Ph. Gaudrat, "Les contrats de fourniture de logiciel. Conséquences contractuelles de la loi du 3 juillet 1985, Droit de l'Informatique, N° 8.
It is in fact admitted that an essential function of copyright is the right for any owner to calculate the royalties due on the basis of the real or probable number of reproduction and to fix the conditions of distribution (Judgement, European Court of Justice, Coditel Case, Rec., 1980, p. 881 et seq. on this order, C. Doutrelepont, Les arrêts Coditel face au droit interne et au droit européen, J.T., 1984, p. 597 et seq.).

(39) Cf infra n° 25, regarding the position of other legal systems, such as the USA.

(40) The potential number of simultaneous users and the possibility of creating a personal database appear to be objective criteria.

(41) For example, in the context of the C.O.C.O.M. rules.

(42) For example in the case of Chemical Information System and Echo Service (EC Commission).

(43) Télésystèmes, Annexes 4 G (published in Choisy, op. cit., p. 85).

(44) This is the First Sale Doctrine. In this connection, Th. S. Warrick, Large Databases, Small Computers and Fact Modems., On-line, July 1984, p. 58 et seq. in Intellectual Property Rights in an Age of Electronics and Information, Report, April 1986, p. 54 et seq.

(45) Cf the 10 categories of the E.U.S.I.D.I.C. Code of Practice.

(46) (47) The Downloading Policies of Excerpta Medica (NL) and I.N.S.P.E.C. (institution of Electrical Engineers Station House) (UK) are extracted from Benson-Weinberg's article cited above. Predicast's approach falls into the first type.

(48) Recommendation 6.18 of the E.U.S.I.D.I.C. Code stipulates : "It is the recommendation of this Code that the basic terms of an unlimited term with the right to unlimited re-use of the single machine-readable copy, without further payment to the information owner or the vendor. Within these conditions the licences may use the information in any way they wish including re-formatting, sorting or merging with other information provided the conditions of clause 6.15 are followed."

(49) It will be noted that this seems therefore to permit the creation of a personal database, that is to say with the addition of information belonging to the user, once in accordance with clause 6.15, the units from the database have been clearly identified.

(50) Clause 6.20 : "This basic license condition does not extend to computer systems where the information can be accessed simultaneously by multiple users. The purchaser may not use downloaded information for multiple simultaneous access (either through multi-user operating being made directly between the purchaser and the owner of the information product)".

(51) Clause 6.21 : "It is a recommendation of this code that the licensee is forbidden from re-selling the information licensed and is forbidden from any form of redistribution outside the organisation purchasing the licence unless either of these actions is specifically permitted by the owner of the information".

(52) Such as those set out in the appendix to the user contract offered by D.I.A.L.O.G., incorporating those of more than 60 producers.
Cf. also the clauses published by M.G. Choisy, Lamy and Benson and Weinberg.

(53) Note in the D.I.A.L.O.G. Appendix (Sept 84) : "The following Databases may not be reproduced, stored in machine-readable form, or transmitted in any means, electrical, mechanical, photocopy or otherwise ... (the names of some 20 information products follow)".
Cf also art. 7 of Téléconsulte.

(54) Télédoc:" The customer undertakes not to reproduce more than 10 copies".

(55) For example in Fact Sheet C.A.S. Downloading, proposed by Chemical Abstracts; Compare Mead's "Temporary Information Storage" and "Downloading from the I.N.S.P.E.C. Database".

(56) Same idea in Excerpta.

(57) Spidel, art. 2.5., of the large number of contractual clauses set out by M.G. Choisy and Benson-Weinberg.

(58) Also note in certain contracts, an undertaking not to compete with the producer : "The downloaded information may not be used to create a competition business database for resale". (Mark Data Retrieval - Electronic Yellow Pages - Downloading Policies).

(59) Thus Chemical Abstract speaks of individuals or companies that are not wholly owned subsidiaries, Derwent also except governmental agencies.

(60) To be noted that among the few clauses referring to this problem, that of Derwent World Patent Index, set out in the appendix to the Dialog, Database supplier Terms and Conditions, "Notwithstanding the termination of this contract, the searcher's above undertakings and acknowledgements shall continue and remain in full force".

(61) Cf. the definition of Downloading already mentioned by "Fact Sheet C.A.S. Downloading" of Chemical Abstracts which would allow this kind of creation.

(62) The same requirement is found in Psyc Infor Permissions.

(63) M.G. Choisy, op. cit., 42. Cf. the same clause : "Copyright source acknowledgement is required for all copied and reprinted information" found in Anglo-saxon contracts.

(64) Cf in this connection, M. Bing's report cited above note (29).

(65) Without wishing to cite them all, note the clauses laid down by O.E.C.D., O.P.O.C.E., A.N.A.I.S. along this line.

(66) The code even adds : "Any attempt to remove or otherwise disguise such identification should be regarded as a fundamental breach of the agreement between the owner or host services and the purchaser of the information". Excerpta and I.N.S.P.E.C's clauses can be considered to the applications of the Code.

(67) Same remark applies to E.S.A. - I.R.S. (art. 8) : "the user shall not use the downloaded data to combine with other informations to create a consolidated file to be offered on-line or in any other way to third parties".

(68) Cf the extract from correspondance with Lois Ann Colaianni published in Benson-Weinberg, p. 91.

(69) This information will be due all the more so since authorisation by the producer will be necessary for this contractually prohibited market. (Cf. in this connection, the C.N.R.S. lab, F.R.A.N.C.I.S., C.I.S.I. clauses, etc.)

(70) E.U.S.I.D.I.C. Code Provision cited above.
Same solution in fact Sheet C.A.S. Downloading : "Annual Agreement permits continued downloading for that year. If the renewable fee is not paid, the customer may still retain and use previously downloaded information".

(71) Mackemann, op. cit., 536.

(72) M.G. Choisy, op. cit., p. 42.

(73) In order to realise this, it suffices to read the introductory sentence of most of the restrictions on use set out in the Appendix to the Dialog user contract.
In addition the reply made by Dialog's Marketing Manager to Benson and Weinberg (art. cited p. 78) should be noted : "Dialog does not have a formal policy on downloading. It is each customer's responsibility to use information in accordance with the general terms of copyright law"... In this connection, also, the reflections of J.J. Beard (copyright Law and Downloading, Proceedings of the Congress for Librarians, Feb 18, 1985, Peiran Press, 1985, 61 et seq. which studies the extent to which the clauses set out above constitute modifications of the doctrine of "fair use" (equivalent to the principle of admissibility of the private copy found in continental European laws).

(74) Cf, however as an example, article 8 of the Télésystèmes contract which states : "Intellectual property in databases, the data they contain derived products and utilization documents belong exclusively to the Producers of the said bases".

(75) On this question, in particular J. Bing's report.

(76) Are these not in fact private copies ?
The E.U.S.I.D.I.C. Code echeos this uncertainty : "Because changes information product can be made quicky and relatively cheaply with the aid of computer technology, the protection of copyright law, are of limited relevance since they assume print as the medium for publication and rely largely on the compilation and presentation of information rather than its content."

(77) In this connection, the works of G.I.D. (Frankfurt) set out in Hackemann-Scheller, op. cit. 150 et seq.

(78) Apart from librarian, the A.L.A. also includes brokers and the main producers of scientific databases.

(79) From 1975, the A.L.A. recommended protection of the confidentiality of searches "from leasers by Agents of local, state and federal governments". On the various actions carried out by the A.L.A. in this way, read M.K. Isbel and M.K. Cook, Confidentiality of Online Bibliographic Searches, Attitudes and Practices, R.Q. Summer 86, p. 483 et seq.

(80) Example reported by a person working in an encryption laboratory who was questioned; the engineer was called by his employer,
1. to justify his consumption of scientific databases, judged to be excessive;
2. to justify interrogation of a video games program installed by MINITEL.

(81) Following the actual title of the O.T.A. report : Electronic Surveillance and Civil Liberties, October 1985.

(82) Cf C.N.I.L's recommendation relating to "automatic switching devices" (5th report cited pp. 139 and 140).

(83) For a more detailed discussion of this question, Y. Poullet, Privacy and Electronic Press, Report legal Observatory, January 1987.

(84) Such as Luxembourg, denmark, Austria, Norway and Iceland.

(85) For example, the Council of Europe Convention and the OECD guidelines.

(86) For a discussion of the applicability of data protection legislation to corporate entities, P. and Y. Poullet, Applicabilité aux entreprises d'une législation protectrice des données, in Banques de Données, Entreprises, Vie Privée, Actes du Colloque de Namur, Brussels, 1980.

(87) "The consequences of the transmission of incomplete, erroneous or non-updated data (e.g. on the solvency of a company) may have unfortunate consequences for the latter", (Y. Poullet, report cited).

(88) In this connection, the remarks of Flaherty, Privacy in two ways electronic services, London, 1985.

(89) In particular, article 9 of the German Staatsvertrag concerning the introduction of the Bildschirmtext. On this point, Cl. Monville, Y. Poullet, la demande finale en télématique, Rapport final, FAST, January 1987.

(89 bis) It is easy to envisage that user companies wish to protect the data resulting from the use of the base against their being divulged to third parties, or against any internal use (except for relevant reasons : marketing). There are certain confidentiality clauses in user contracts and some authors even go so far as speaking of the existence of the intellectual property right of the user over his method of use of the database. For example, at present clauses are found in contracts which in our view are too often ones of the following type : "The Agency guarantees that it will take all reasonable measures for ensuring the confidentiality of the customer's searches, and in particular that it will not transmit the results of the said searches to third parties, unless the Customer has given specific written authorisation of this".
The recognition of the right to confidentiality of searches might start to take the form of the promulgation of codes of conduct adopted by the said "information agencies", which would open the right to all indexed parties to search their databases with regard to basic information but not the information about them (result : e.g. credit value of a company) It is uncertain whether the promulgation of such codes of conduct would be sufficient. In addition to the fact that the content is drawn up by the interested parties themselves, their legal value is limited : they are simple professional standards and above all it is not clear how their non-respect could be sanctioned, as the indexed company might be a third party, i.e. a person with no contractual relationship with the data bank (Flaherty, Protecting Privacy in Two Ways Electronic Services, London 1985).

(90) For the application of German legislation, cf. the comments made by Goebel et alii, op. cit. 148 et seq.

(91) In this connection, the clauses of "Muster für Allgemeine Bedingungen für den Dialogteilnehmer" published in Goebel etalii, op. cit. p. 271.
6.2. "Von Dialogteilnehmer gesicherte Pragestellungen und profile werde n ubenfalls maschinenlesbar gespeichert und im Auftrag des Dialogteilnehmers maschinell verarbeitet".
6.3. "Anschriften, Fragstellungen und Profiles des Dialogteilnehmers werden von den Fachinformation Zentren vertraulich behandelt. Bei einer Benutzung der Datenbank werken Name und Anscrift des Dialogteilnehmers an, für firmeinterne Zwecke, insbesondere zur Kundenbetreuung weitergegeben".

(92) It is noted that references in user contracts to the said legislation is rare. However, we have found some in German agreements. Cf for example, clause 6.1 of Muster für "Allgemeine Bedingungen für den Dialogteilnehmerdienst", published in annex to the work of Goebel, Hofer Prey, Scholler, op. cit. p. 271 : "Der Dialogtellnehmer wird hiermit gemäss N 26 Abs, 1 des B.D.S.G. davon unterrichtet, dass die Fachinformationszentren seine vollständige Anschrift in machinenelesbarer form speichern und für Aufgaben, die sich aus dem Autrag ergeben, maschinell verarbeiten".

(93) G.F.F.I.L. report cited p. 65.

(94) Cf in this connection, P. Lambert, Le secret professionnel, Brussels, 1985.

(95) In English law, in any case there will be no civil liabiity.

(96) Compare art. 458 of the Belgian Penal Code supported by case law, relating to insurance brokers and company lawyers.

(97) Compare with reflections on privacy legislation, supra n° 50. The question is however debated, certain French decisions have made orders against bankers on the basis of article 378 with regard to the violation of business secrets.

(98) In this connection for a restrictive interpretation of the persons bound by professional secrecy, P. Lambert, op. cit., P. 144 et seq.

(99) Op. cit., 276 Lambert even specifies that these must be necessary confidents "whose agency is imposed by law".

(100) In this connection, the clauses analysed by M.G. Choisy, op. cit., p. 31, Bureau M. Van Dyck, Etude des clauses proposées par les serveurs DIANE, Clause 6.

(101) We shall return later to the clauses contained in producer-information provider contracts when the information provider has concluded the user contract.

The undertaking often covers results of searches, although liability clauses very clearly limit the possible sanction and sometimes the means ; "The Agency takes all reasonable measure to ensure the confidentiality of the user's searches and in particular will not release the results of such searches" (E.S.A. - I.R.S.). Note that in another contract the exemption of the information service provider for acts by its employees (TELECONSULTE).

(102) M.G. Choisy, op. cit., p. 31.

(103) For example, the interest that a bank or broker might have in processing a customer's searches so as to assess its commercial strategy, its credit value, etc.

(104) Do customer requirements extend to the possibility of disputing bills ? It is clear that the vague wording used by Data Star does not enable us to answer this question.

(105) Billing is not referred to.

(106) "(At the end of the contract) all the customer information existing in the C.I.S.I. data systems will be destroyed" (C.I.S.I.).

(107) It is noted that when the search is via a broker, the user may likewise wish there to be no transmission of the detail of its searches to the information service providers (cf supra).

(108) Télésystèmes, C.N.E.X.O.

(109) G.CAM.

(110) I.N.K.A.

(111) BELINDIS.

(112) In another clause in the same contract we note : "X will inform Y over a base period to be determined, of the commercial actions it is taking. At the end of each month, C will communicate the customer files and the summaries of the requests expressed by the users".

(113) G.F.F.I.L., report cited, p. 140.